

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: NEW ENGLAND GAS :
COMPANY RATE FILING : DOCKET NO. 3401

REPORT AND ORDER

On April 4, 2002, the Rhode Island Public Utilities Commission ("Commission") issued its fourth set of data requests to the New England Gas Company ("NEGas"), a division of Southern Union. On April 25, 2002, NEGas filed responses to these data requests but sought confidential and proprietary treatment for its data responses to 4-05, 4-06, and 4-08. These data requests were as follows:

4-05: With regard to the work stoppage and contract dispute with Local 12431, please provide a worksheet detailing the amounts unpaid as a result of the work stoppage and contract dispute (i.e. salaries not paid, health care not paid, payroll tax not paid, etc.). Please indicate the time frame covered by the response.

4-06: With regard to the work stoppage and contract dispute with Local 12431, please provide a worksheet detailing the expenses incurred as a result of the work stoppage and contract dispute (i.e. additional security services, additional overtime for non-union employees, contract labor, legal advertising, etc.). Please indicate the time frame covered by the response.

4-08: Please provide a copy of the analysis by Park Row Associates indicating expected health insurance expense increases in January 2003 of 25.65% (ProvGas) and 30.55% (Valley Gas).

On April 30, 2002, at a public hearing, the Commission informed NEGas that it would hear oral argument on May 3, 2002 from the parties as to whether NEGas' responses to Commission data requests 4-05, 4-06 and 4-08 should remain confidential and proprietary.¹ On May 2, 2002, NEGas filed a letter to the Commission requesting that a portion of this hearing be held in a non-public forum pursuant to Rule 1.20(a) of the Commission's Rules of Practice and Procedure ("Commission's Rules"). In addition, NEGas stated that the costs related to the labor dispute were not included in NEGas' proposed rates or the rates that will be established in the proceeding. Accordingly, NEGas stated that the information requested by the Commission was not relevant to the present proceeding.

Also, NEGas presented arguments for the responses to Commission data requests 4-05, 4-06 and 4-08 to remain confidential. NEGas stated that the responses to data requests 4-05 and 4-06 were exempted from disclosure under the Access to Public Records Act, R.I.G.L. § 39-2-1 et seq. ("APRA"), pursuant to exemptions (B)(E) and (H) of R.I.G.L. § 38-2-2(4)(i).² In addition, even if a specific exemption does

¹ In accordance with the Commission's past practice, the presiding commissioner, Chairman Elia Germani, preliminarily granted NEGas request for confidential treatment of the data responses. After receipt of a request for access to public records or upon the Commission's own initiative, the full Commission makes a determination as to the request for confidential treatment.

² R.I.G.L. § 38-2-2(4)(i)(B) exempts "commercial or financial information" which would cause "substantial harm to the competitive position" of the company. The Providence Journal Co. v. Convention Center Authority 774 A.2d. 40, 47 (R.I. 2001). R.I.G.L. § 38-2-2(4)(i)(E) exempts records that "would not be available by law or rule of court to an

not apply, NEGas stated the Commission must apply a balancing test to determine whether the public interest for disclosure outweighs the interest of NEGas in keeping the information confidential.³

In regards to the response to data request 4-08, NEGas argued that the release of this information would seriously undermine its negotiating position with third-party health care insurers. As a result, NEGas stated that this data response is exempt from public disclosure under R.I.G.L. § 38-2-2(4)(i)(B).

On May 3, 2002, the Commission conducted a hearing on whether responses to Commission data requests 4-05, 4-06 and 4-08 should be deemed confidential. The hearing was conducted at the Commission's offices, 89 Jefferson Boulevard, Warwick, Rhode Island. The following appearances were entered:

FOR NEGAS:	Robert Keegan, Esq. Craig Eaton, Esq.
FOR DIVISION:	Paul Roberti, Esq. Assistant Attorney General
FOR LOCAL 12431:	Dennis Roberts II, Esq.
FOR COMMISSION:	Steven Frias, Esq. Executive Counsel Cynthia Wilson, Esq. Senior Legal Counsel

opposing party in litigation. R.I.G.L. § 38-2-2(i)(H) exempts "reports and statements of strategy or negotiations involving labor negotiations or collective bargaining".

³ Providence Journal Co. v. Kane 577A.2d 661, 663-64 (R.I. 1990).

At the outset of the hearing, NEGas argued that the responses to Commission data requests 4-05 and 4-06 were not relevant to the rate proceeding because the costs related to the labor dispute were not included in the test year cost of service, nor would they be included in the rate year cost of service established in this proceeding. However, the Commission noted that NEGas had failed to object to the discoverability of the information on the basis of relevancy of data requests 4-05 and 4-06, as required by Commission Rule 1.18(c)(3).

During the hearing, NEGas agreed to publicly disclose the response to data request 4-05, except for the last two lines thereof relating to the costs arising from the labor dispute. Also, all the parties were in agreement that the response to data request 4-08 is a non-public document because of the exemption conferred by R.I.G.L. § 38-2-2(4)(i)(B) regarding the disclosure of financial information that would substantially harm the competitive position of NEGas. The Commission ruled in favor of granting confidential treatment to data response 4-08.

In regards to the last two lines of the response to data request 4-05 and the response to data request 4-06, NEGas' first argument was that this information was non-public pursuant to R.I.G.L. § 38-2-2(4)(i)(B) because its release would cause substantial harm to NEGas' competitive position with respect to the United Steelworkers of America, Local 12431. However, NEGas could not present any case law in which the

exemption under federal or state law has been interpreted to find a labor union is a competitor with its own company.

NEGas' second argument was that this information was non-public because it would not be available to an opposing party litigation under R.I.G.L. § 38-2-2(4)(i)(E) because, in a National Labor Relations Board ("NLRB") proceeding, this information would not be available to Local 12431. However, NEGas could not cite a provision of the National Labor Relations Act ("NLRA") or a rule of procedure for the NLRB that clearly prohibits a union from receiving information as to the costs to the company during a labor dispute. In addition, the Commission noted that NEGas had failed to object to discoverability of data request 4-06 and therefore the counsel of Local 12431, as a party to this proceeding, was in possession of this document.

NEGas' final argument was conducted in a closed session at the request of NEGas. In this closed session, NEGas argued that the response to data request 4-06 was not a public document under R.I.G.L. § 38-2-2(4)(i)(H) because it was a report or statement of labor strategy or negotiation involving labor negotiations. Essentially, NEGas argued that the disclosure of data response 4-06 and the last two lines of data response 4-05 would impact labor negotiations between Local 12431 and NEGas, and possibly impact NEGas' bargaining position in a negative manner.

COMMISSION FINDINGS

At the outset, the Commission notes that its own Rule 1.2(g)(1) states that the burden of proof is upon NEGas to demonstrate that the information provided should remain confidential. The Rhode Island Supreme Court has held that the basic policy of the APRA favors disclosure.⁴ The Commission finds that none of the three exemptions in the APRA cited by NEGas are applicable to data response 4-06 and the last two lines of data response 4-05. First, the Commission notes that R.I.G.L. § 38-2-2(4)(i)(B) has not been interpreted to deem a labor union which is in dispute with its own company to be in competition with its own company. Second, the Commission notes that R.I.G.L. § 38-2-2(4)(i)(E) is not applicable because neither the NLRA nor the rules of the NLRB clearly prohibits Local 12431 from receiving information as to the costs and savings relating to a work stoppage. In addition, the credibility of this argument was undermined because NEGas failed to object to the data requests and therefore, as a party to this proceeding, Local 12431 has this information. Third, the Commission holds that the information contained in data responses 4-06 and 4-05 do not squarely fall into the exemption provided in R.I.G.L. § 38-2-2(4)(i)(H). NEGas essentially argues that any report that may impact strategy or negotiation involving labor negotiations is a non-public record. However, the exemption expressly encompasses only “reports and statements of strategy or

negotiation involving labor negotiations.” There is a substantial difference between these two interpretations. NEGas is asking the Commission to broadly construe this exemption, although the intent of the APRA is to favor disclosure.⁵ Accordingly, the Commission will not broadly construe the exemptions of the APRA and finds data response 4-06 and the last two lines of data response 4-05 to be public documents.

Although a document may not fall within the exemptions of APRA, a balancing test is conducted to weigh the privacy interests of the affected party against the public’s interest in disclosure.⁶ In this case, the information contained in data responses 4-06 and 4-05 relate to how much and in what manner ratepayer funds are being expended by NEGas during the work stoppage. Because NEGas is a public utility regulated by this Commission, the public needs and deserves to know how ratepayer funds are being expended. This interest outweighs NEGas’ speculative argument that the release of the cost information contained in these data responses will somehow impact the negotiations between NEGas and Local 12431. As public utility regulators this Commission is charged with establishing just and reasonable rates, based upon a utility’s revenues and expenses which, among other rate case information, are normally made available to the public in the course of general rate proceedings. The Commission is not persuaded by

⁴ Providence Journal v. Kane 577 A.2d. 661, 663 (R.I. 1990).

⁵ Id.

⁶ Id., at 663-664.

NEGas' arguments that the information in question should not also be disclosed to the public in connection with the pending rate proceeding.

After the decision was made by the Commission majority to disclose data responses 4-06 and the last two lines of data response 4-05, NEGas moved for a stay of the Commission's decision to afford NEGas time to file an appeal and seek a stay from the Rhode Island Supreme Court of the Commission's order to disclose the data responses. Acknowledging that immediate public disclosure of the data responses would moot NEGas' appeal and request for a judicial stay (in the event NEGas were to prevail), the Commission granted a stay of its order until May 10, 2002 at 5:00 p.m. in order to afford NEGas adequate time to appeal the Commission's order and seek a stay of the order from the Rhode Island Supreme Court.

Accordingly, it is

(16990) ORDERED:

1. Data Response 4-08 is deemed confidential.
2. Data Response 4-06 and the last two lines of Data Response 4-05 are deemed public documents and shall be disclosed to the public.
3. New England Gas' motion to stay the effect of the Commission's order to disclose to the public Data Response 4-06 and the last

two lines of Data Response 4-05 until May 10, 2002 at 5:00 p.m. is granted.

EFFECTIVE AT WARWICK, RHODE ISLAND PURSUANT TO A BENCH DECISION MAY 3, 2002. WRITTEN ORDER ISSUED MAY 6, 2002.

*Elia Germani, Chairman

Kate F. Racine, Commissioner

Brenda Gaynor, Commissioner

*Chairman Germani dissents as to the Commission's decision to publicly disclose data response 4-06, and the last two lines of 4-05 at this time.

Dissenting Opinion of Chairman Germani;

I concur with the majority that the record ordered to be released by the majority is a record which does not fall within the twenty-three (23) categories of information that are exempt from public disclosure under the Access to Public Records Act (APRA). Thus, the decision of the majority is correct in setting forth that the requested information does not fall within one of the twenty-three (23) categories that are exempt from disclosure under the APRA.

However, under the APRA the Commission must also satisfy the second part of the two-part test in which the Commission must conduct a balancing test weighing the privacy interests of the affected entity against the public interest in disclosure (*Providence Journal Company vs. Kane 577 A2nd 661, (RI 1990)*). It is my opinion that in conducting this balancing test, the damage to the New England Gas Company if this record is released at this time far outweighs the interest of the public in immediate disclosure. The public will suffer little or no harm if the release of this record is delayed temporarily. On the other hand, if the requested record is released now then damage to New England Gas Company will be irreparable in that the release of that information would adversely affect New England Gas Company in the collective bargaining process. I, therefore, dissent from the majority decision to release the record at this time.

Chairman Elia Germani